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Supreme Court of the United States

October Term, 1960

No. 983

MILDRED C. TRIVETTE, - - - - *Petitioner,*

v.

NEW YORK LIFE INSURANCE COMPANY, - *Respondent,*

RESPONDENT'S BRIEF
In Opposition To Petition For Writ of Certiorari.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petition for Certiorari filed by Mildred C. Trivette [herein called Mrs. Trivette] should be *denied* because:

(1) There was not sufficient (or any) evidence that the pistol-shot-in-head death of Maurice Trivette [herein called Mr. Trivette] occurred through accidental means, to make a jury issue on Mrs. Trivette's claim for "double indemnity" under his policies; and

(2) Mrs. Trivette's own eye-witness evidence and that of her other own witnesses conclusively showed without the slightest contradiction that Mr. Trivette deliberately shot and killed himself, which is a cause of death excluded from "double indemnity" coverage (A. 11a-12a).

Both the District Court, in directing a verdict for New York Life Insurance Company [herein called New York Life], and the United States Court of Appeals for the Sixth Circuit in affirming, correctly applied the law of the State of Kentucky. That decision is not in conflict with any applicable law of that State.

Clearly, there is not involved, to any extent, any federal question whatever, or even the question (which Mrs. Trivette elaborately argues) whether "submitting or not submitting an issue of fact to a jury" is, as she describes it, "a matter of substantive law, or a matter of procedure" (Petition, p. 2) because, regardless of whichever it might be, in this case the evidence did not raise any jury issue whatever.

Counter-Statement of the Case.

New York Life cannot accept the statement of facts in Mrs. Trivette's Petition for the writ, either in its Statement Of The Case at its pp. 3-7 (consisting principally of a quotation from the *dissenting* opinion of Circuit Judge Pope) or in its Appendix III Statement Of The Facts at its pp. 28a-34a, as being a sufficiently complete or accurate statement of the facts which are material to the consideration of the questions presented.

However, since this brief necessarily supplies her omissions and corrects her inaccuracies, in the Argument at pp. 3-10, *infra,* with reference to the insufficiency of the evidence to require a submission of the case to the jury, they need not be here stated.

SUMMARY OF ARGUMENT.

I. The evidence showed, without conflict or basis for dispute, that the insured, Mr. Trivette, *intentionally* shot himself through the head, and died by self-destruction and suicide; and, the District Court properly directed a verdict for New York Life (pp. 3-10 *infra*).

II. The District Court, in directing a verdict for New York Life, correctly applied the applicable Kentucky substantive law (pp. 10-16 *infra*).

III. There is not any conflict whatever between the Court of Appeals' decision and the decision of any other court of appeals, on the question of intentional suicide being a *defense* to a "double indemnity" claim; and no federal question is involved (p. 17 *infra*).

IV. As the undisputed evidence was that Mr. Trivette intentionally shot himself, it is entirely academic and irrelevant to consider whether the submitting or not submitting of an issue of fact to a jury is a matter of "substantive law" or of "procedure" (pp. 18-23 *infra*).

V. This case does not involve any question of "trial by jury" under the Seventh Amendment to the Constitution (pp. 23-24 *infra*).

VI. Neither the coroner's jury verdict nor Mr. Trivette's death certificate was admissible in evidence for any purpose; and the District Court correctly *excluded* them (p. 25 *infra*).

ARGUMENT.

If Mrs. Trivette's Questions 1 and 3 (Petition, p. 2) are resolved against her—that is, if there was no jury issue on the question of Mr. Trivette's intentional suicide, which is the only matter those two questions raise—then her Question 2 (p. 2) as to whether the submitting or not submitting of an issue of fact to a jury is a matter of "substantive law" or of "procedure" (p. 2) is not in any manner involved, is entirely academic and irrelevant to this case, and need not be considered.

Therefore, this brief will deal first with the subject of whether there was any jury issue on the question of intentional suicide.

FIRST POINT.

[Mrs. Trivette's Questions 1 and 3; Petition, p. 2]

The evidence showed, without any conflict whatever, that Mr. Trivette *intentionally* shot himself through the head, and died by self-destruction and suicide.

Therefore, the District Court properly directed a verdict for New York Life.

All of the testimony in the case came (*a*) from Mrs. Trivette herself, who was an eye-witness, and (*b*) from her own other witnesses. All agreed upon all the basic facts. They lead immutably to the conclusion, and established beyond cavil, that Mr. Trivette intentionally destroyed himself.

Mrs. Trivette, as an eye-witness to Mr. Trivette's suicide, saw the *whole* of his actions; and testified in open court out of her *own* knowledge as to what she saw.[1]

I. Mr. Trivette's Intentional Suicide.

[1] Mr. Trivette's pistol-shot death occurred October 19, 1957, about 10 o'clock on a Saturday night (A. 43a), in his bedroom and in Mrs. Trivette's *presence,* after he had been in a 2½ hours "liquored-up" (but not drunk, A. 80a) abusive tantrum—"He was *very* angry" (A. 66a) and in one of what Mrs. Trivette variously described as his "ugly" or "dark" or "sullen" moods (A. 76a-78a; 89a-90a).

During that time, he and Mrs. Trivette "ate in silence", except "my husband didn't eat any more" (A. 56a), and "he didn't talk any more", and acted "dark and sullen" (A. 90a); "we just sat there" (A. 91a) until he went into the living room where the children were watching television, but a few minutes later one of the children reported to Mrs. Trivette that Mr. Trivette was not watching—"he's just *staring*" (A. 57a).

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[1]The Kentucky law, which applies in this diverse citizenship removed case (*Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Guaranty Trust Co.* v. *York,* 326 U. S. 99), is that when a *party* to a suit, as was Mrs. Trivette, testifies to facts within her *own* knowledge which shows she does not have a case, her testimony constitutes a *"judicial admission"* which is "conclusive" and "removes the proposition in question from the field of disputed issues" and "precludes" her from "relying on other evidence" to contradict her own testimony. See, *Sutherland* v. *Davis,* 286 Ky. 743; *Bell* v. *Harmon,* 284 S. W. 2d (Ky.) 812.

After a 20-minute trip to his nearby garage (A. 57a) he entered his bedroom, in a few minutes signalled Mrs. Trivette to come in there—"he was still angry", and tore up and threw across the room a new shirt and slacks she had previously bought for him (A. 58a-60a).

Mr. Trivette suddenly "jerked the gun up" (A. 95a) from under his belt, and "all in a flash" (A. 187a) shot himself in his head—which he had "tilted slightly to the *right*", or "over toward the *right* shoulder" (A. 64a)[2]—with a .44 caliber hammer type pistol which was 12½ inches long and weighed nearly 2½ pounds (A. 99a-100a).

[2] Mrs. Trivette had been sitting on a stool across the room (A. 60a) in front of a dresser.[3] When she saw his actions, she stood up, screamed, threw up her hands, and started toward him to "knock the gun away" (A. 95a-96a); but before she could reach him he had fired the pistol—"all in a flash" without halt or interruption.

Mrs. Trivette testified that she remembered that a few minutes later she exclaimed to a neighbor

"I couldn't save him" (A. 96a).

and that what she meant by that exclaimation, and "what I had in mind", was to "get over there maybe and knock the gun away" (A. 96a). She did that—screamed, threw up her hands, wanted to "get over there", she said, so she could "knock the gun away"—

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[2]Mr. Trivette was *right*-handed (A. 115a).

[3]See Trivette Exhibit "B" [chart] and Plaintiff's Exhibit 8 [photograph].

all because with her own eyes she *saw*, and as an eye-witness actually *knew*, he intended to shoot himself with that gun.

Her purpose to "knock the gun away" repels her speculative "thought", which she later had (A. 66a), and which she now strongly urges—but correctly describes in her petition as a "surmise" (p. 37a)—that his elbow hit the wall causing the gun to deflect. Any such sort of interruption in his movement is repugnant to the admited fact that the entire movement was "all in a flash".

Yet, in her petition she argues to this Court that what she had in mind in starting toward him was only "to calm him" (p. 31a)—an *erroneous* expression which even Judge Pope was induced to pick up from her brief in the Court of Appeals (Petition, p. 23a), and repeat in his dissenting opinion (Petition, p. 6, 33a).

[3] The bullet from the 1½-inch long cartridge (A. 99a-100a) entered the right side of Mr. Trivette's head, ½ inch above and ¾ inch to the front of his right ear (Plaintiff's Exhibit 14; A. 120a-123a). It ranged upward at an angle—his head being "tilted slightly to the *right*" or "over toward the right shoulder"—and came out 1½ inches left of the top of his head's center line (A. 121a-122a).

The bullet hole point of entry was ½ inch in diameter. The powder burn extended only ⅛ of an inch beyond the hole (A. 120a-121a), thus indicating that Mr. Trivette had pressed the muzzle of the pistol

close to or even against his skull, because, as both parties agree, the closer a gun muzzle, at the time of discharge, is to the flesh the *narrower* is the powder burn around the hole—in this case only ⅛ of one inch.

In that connection Mrs. Trivette's Petition refers to the characteristic "back suction" drawing blood into the muzzle of a pistol when the muzzle is pressed against the side of the head at the time of discharge. She then *incorrectly* states that there was not any evidence of any blood "on or in the gun" with which Mr. Trivette killed himself (Petition, p. 36a). She thus fails to reveal to this Court the uncontradicted evidence that "there *was* blood on the *bed* underneath the *pistol*" (A. 159a) onto which the pistol was laid after he shot himself. That blood obviously was the characteristic "back suction" blood that was drawn into the barrel of this pistol when it was fired with the muzzle pressed to his skull.

[4] As is the case with many suicides—especially "impulsive" suicides (see pp. 15-16, *infra*) it is useless to inquire why Mr. Trivette decided to kill himself. He appraised his own life and his own circumstances, which he knew better than anyone else.

Some of those circumstances were:

(*a*) Mr. Trivette was "over-tired" and under "terrific strain". Mrs. Trivette emphasized that. She testified that, with his mining and garage business, he was "under terrific strain", "had a lot of things on his mind" (A. 59a), was "over-tired" (A. 97a), "too many irons in the fire", "too many hours of working"

(A. 77a)—sometimes as much as 18 or 20 hours a day, with an average 12 to 14 hours (A. 45a)—and was "irritable" from his "terrific responsibilities" (A. 86a).

His employee, Little, testified he was a "hard worker", and

> "I don't see how the man [Trivette] stood up *as long as he did,* working the way he did"(A. 183a-184a).

But that is not all.

(*b*) The Petition for this writ emphasizes assertions that Mr. Trivette was "happily married" (p. 22) and "devoted to his wife"' (p. 29a). Those are incorrect assertions, without supporting *facts,* which led Judge Pope in his dissenting opinion to refer to him as "attentive to and affectionate with his wife" (Petition 4, 21a).

The *facts* in evidence about that are:

Repeatedly, for years, he had been violent and abusive with her.

Ten years before, in anger he "got the gun out", "stomped out of the house", and "almost scared me to death" (A. 77a, 83a-84a).

Seven years before, in anger he "broke up all the things in the living room", "there was glass all over the living room and dining room"; and he "got the gun out" and ordered Mrs. Trivette, **"Now, you clean it up"** (A. 77a-78a, 85a-87a).

A few months before, in anger he shot out the bedroom light (A. 71a, 76a, 87a-89a).

Mrs. Trivette testified that she was "terrified" of the gun, "it was so big"—and that he **knew** she was "frightened of the gun" (A. 78a).

Is that the behavior of a man who is "happily married" or is "attentive to and affectionate with his wife"?

Mr. Trivette's brother, Warren Trivette, who was Mrs. Trivette's own witness and lived only 300 yards away, when asked whether Mr. and Mrs. Trivette's relations were "pleasant", equivocally answered:

> "I don't believe I said they were pleasant" (A. 116a).

Mrs. Stewart, who was Mrs. Trivette's closest neighbor and her own witness, testified to trouble between Mr. and Mrs. Trivette "now and then" (A. 135a) and that "they would fuss on weekends or have arguments" (A. 140a). Mrs. Trivette, when recalled, did not dispute those matters (A. 185a-187a).

Mr. Trivette made his own appraisal of his own life and circumstances; and to paraphrase the language of his employee, Little (p. 8, *supra*), he considered that he had "stood up as long as he" could.

[5] The District Court [SWINFORD, J.], a former active Kentucky lawyer—with more than twenty years' trial experience on the federal bench in Kentucky and a vast knowledge of Kentucky substantive law—saw the witnesses and heard them testify orally, and recognized that there was not the slightest conflict in the testimony on any material matter and absolutely no reasonable basis for any reasonable inference—"not

even an *imaginary* idea" (A. 25a)—that Mr. Trivette died otherwise than through intentional self-destruction, saying that

> "by no stretch of the imagination, could the jury conclude that there was an accident. * * *
>
> There could not possibly be drawn an inference or deduction that that gun exploded by any accidental means. It was a *deliberate* act of the decedent, Maurice Trivette" (A. 26a, 27a).

II. The applicable Kentucky substantive law required the directed verdict against Mrs. Trivette.

The substantive law of Kentucky (which *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, requires to be applied) consistently for many years has been, and is, that there cannot be recovery of accidental death or "double indemnity" insurance, and a verdict must be directed against the beneficiary, where the uncontradicted or undisputed evidence and reasonable inferences from it are inconsistent with a hypothesis of an accident and point immutably to self-destruction, even though there was no eye-witness to the self-destruction.

[1] In *New York Life Ins. Co.* v. *Dean,* 226 Ky. 597 [1928], which Mrs. Trivette does not cite, Dean died from a pistol-shot head wound, inflicted outside the presence of any eye-witness. The court held there must be a *directed* verdict for the defendant despite evidence that Dean's personal problems might have impaired his mind (but not sufficiently to cause him to fail to know "the consequences of his act").

The court said that where

> **"there is no reason for honest difference of opinion among intelligent men upon the issue [of intentional suicide], it is then the duty of the court to so instruct the jury. We think the testimony in this case leaves no room for the conclusion essential to a recovery, * * *."**

[2] In *Prudential Ins. Co. v. Tuggle's Adm'r.*, 254 Ky. 814 [1934], which Mrs. Trivette's Petition elaborately seeks to distinguish (pp. 35a-37a). Mr. Tuggle died from a gunshot head wound which accurred in a "dark and uninviting" basement area of his house, outside the presence of any eye-witness. The court held there must be a *directed* verdict for the defendant because one may not "guess" or "suppose" that an accident happened. It said that "a supposition has no legal support or habitation in judicial administration", and that "no presumption [against suicide] can stand in the face of *facts*".

The court reaffirmed the rule that

> "Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for a *reasonable* controversy on the subject, a jury should *not* be permitted to find to the contrary and have such finding stand as a verity in the case, but the question should be decided by the trial court as one of law."

[3] In *Thelen* v. *Mutual Life Ins. Co.*, 261 S. W. 2d (Ky.) 427 [1953], which Mrs. Trivette does not cite, Miss Thelen's body was found in the paved courtyard of a hospital where she was a patient, some ten feet from the outer edge of a roof which projected at the third floor level from one wing of the hospital to another. Although there were no eye-witnesses to her death, the court affirmed a *directed* verdict judgment despite vigorous argument for an inference that she might have accidentally fallen from a window or was seeking some way of escape and "accidentally fell from the roof"—which the court said was only a "mere conjecture or suspicion that the death occurred by accident"—and that

> "It must be remembered that the plaintiff had the burden on the whole case of proving death by accident, *Massachusetts Mut. Life Ins. Co.* v. *Bush*, 236 Ky. 400, 33 S. W. 2d 351, and in view of the evidence introduced by the defendant, the plaintiff's presumption *disappeared.*"

[4] In *Prudential Ins. Co.* v. *Redwine*, 332 S. W. 2d (Ky.) 643 [1959], where the insured, Ewen, died from a pistol-shot chest wound, without an eye-witness, the court held that there must be a *directed* verdict for the defendant despite evidence that Ewen's health in the past five months had continued to improve and he was in uniformly good spirits and frequently cleaned his pistol (leaving room for a "guess" of an accidental discharge of it). The court reaffirmed its decision in the *Tuggle* case *supra*, saying that the conclusion of intential suicide

"is inescapable and there is no room for any *speculation* or surmise to the contrary. Clearly, Ewen intentionally ended his own life."

The District Court's directed verdict in this case applied that Kentucky law.

III. Mrs. Trivette's Kentucky cases distinguished.

[1] Mrs. Trivette's Petition relies upon a mass of Kentucky cases where death occurred outside the presence of witnesses and under *un*explained or mysterious circumstances with other known circumstances furnishing a *reasonable* basis for *reasonable* inferences of an accident. They are clearly distinguishable from this "eye-witness" suicide.

Some of them are:

(*a*) *Ky. Home Mut. Life Ins. Co.* v. *Watts*, 298 Ky. 471 [Petition, p. 18]—no eye-witness; shotgun load entered Watts' body on *same horizontal plane* as was the gun rack on which it had rested;

(*b*) *Aetna Life Ins. Co.* v. *Kaiser*, 115 Ky. 539 [1903; Petition, p. 17]—no eye-witness; double indemnity not involved but defense based only on policy's conventional "suicide clause";

(*c*) *Aetna Life Ins. Co.* v. *Milward*, 118 Ky. 716 [1904; Petition, p. 17]—no known eye-witness; mysterious gunshot death; two pistols by right side, with ownership *not known* of the one which contained the discharged cartridge—reasonable inference insured killed "by some other person";

(*d*) *Metropolitan Life Ins. Co.* v. *Maddox*, 127 S. W. (Ky.) 503 [1910; Petition, p. 18]—carbolic acid death; much evidence acid taken by mistake as a result of neighbor (after borrowing bottle) replacing it upon shelf different from where it was usually kept and on which "pepsin and oil" which insured regularly took was normally kept;

(*e*) *United Benefit Life Ins. Co.* v. *Schott*, 296 Ky. 789 [Petition, p. 18]—pistol-shot wound while riding along highway in automobile with two companions; flourishing of pistol, which discharged, was described by court as "mere blustering and swaggering of a swashbuckler".

[2] The remaining Kentucky cases upon which she relies are those in which there was substantial evidence that the insured was so "devoid of reason" as to be a lunatic incapable of understanding that his fatal act might cause death, as follows:

(*a*) *Inter-Southern Life Ins. Co.* v. *Boyd*, 124 S. W. (Ky.) 333 [1910; Petition, p. 17]—so devoid of reason "he did not know what he was doing";

(*b*) *Mutual Benefit Life Ins. Co.* v. *Daviess*, 87 Ky. 541 [1888; Petition, p. 17]—pistol-shot death; substantial evidence "the mind of insured was so far gone" as to render him "*unconscious* that he was taking his life";

(*c*) *Manhattan Life Ins. Co.* v. *Beard*, 112 Ky. 455 [1902; Petition, p. 17]—conflict in evidence as to whether insured, who died from overdose of

morphine, was too devoid of mind to know what he was doing;

(*d*) *Vicars* v. *Aetna Life Ins. Co.*, 158 Ky. 1 [1914; Petition, p. 18]—no eye-witness; court reversed because trial court erroneously rejected evidence that Vicars was "so insane as not to know what he was doing";

(*e*) *Columbia Natl. Life Ins. Co.* v. *Wood*, 193 Ky. 395 [1922; Petition, p. 18]—mind of insured (after deliberately killing his nine-months-old baby) "so far gone" he did not know his act "would probably result in his death";

(*f*) *Natl. Life Ins. Co.* v. *Watson*, 194 Ky. 355 [1925; Petition, p. 18]—evidence that cyanide of potassium death resulted from mental abnormality or lack of capacity to know what he was doing.

[3] In Mrs. Trivette's brief (p. 28) in the Court of Appeals she *correctly* "conceded that Kentucky has *rejected*" self-destruction caused by "sudden" or "irresistible" impulse as a ground for recovery of "accidental means" insurance; and that such *impulsive* suicide does *not* permit its recovery. See, *Columbia Natl. Life Ins. Co.* v. *Wood*, 193 Ky. 395, 399; *Natl. Life Ins. Co.* v. *Watson's Ex'r.*, 194 Ky. 355, 357; *Anderson* v. *Standard Accident Ins. Co.*, 205 Ky. 587, 592, the court saying in the case last cited, with respect to "sudden" or "irresistible" impulsive suicide:

> "This would absolve him from moral culpability; but would *not* authorize a recovery upon the policy * * *"—unless his mind was so far gone he did not know what he was doing (205 Ky. at 592).

Certainly there was no evidence that Mr. Trivette did not know what he doing. His brother testified that at 5:30 that evening he was in "a very good mood" (A. 53a, 98a). His employee saw him at 7:30 that evening and testified he was "just like he always was" (A. 179a). Twenty minutes before he shot himself he went to his nearby garage, thoughtfully put over $900 of the day's receipts in his pocket (A. 58a, 107a) to take it home as usual—and got his pistol. Killing himself may have been "impusive"; but it was *intentional.*

SECOND POINT.

[Mrs. Trivette's Question 2; Petition, p. 2]

There is no basis whatever for Mrs. Trivette's attempt to bring her Petition under this Court's Rule 19-1(b), as is shown by I (p. 17, *infra*), II (pp. 18-23, *infra*), and III (pp. 23-24, *infra*) next discussed.[4]

I. The Court of Appeals' decision is not in conflict with the decision of any other court of appeals, and is not any departure from the accepted and usual course of judicial proceedings so as to call for exercise of this Court's power of supervision, on the question of intentional suicide being a *defense* to a "double indemnity" claim.

Intentional suicide is a defense to a double indemnity claim not only under the "local" Kentucky law (pp. 10-13, *supra*), but also under the decisions of all of the Courts of Appeals as well as under this Court's own decisions. There is no conflict about that matter, in the decisions of any of the Courts of Appeals; and where, under the evidence there is not any disputed question of fact a directed verdict for the insurance company is proper.

Those matters are too well settled to merit citation of authority.

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[4]Mrs. Trivette's intermingling in her Petition of the several separate matters which she assigns in the "Basis" upon which she seeks the writ (p. 8) and her "Argument" of them (pp. 9-23) causes some difficulty in analyzing her contentions. A separation of discussion of them in this brief, under three separate topics, designated as I, II and III, may clarify them.

II. The undisputed evidence was that Mr. Trivette intentionally shot himself; therefore, the question (*a*) whether submitting or not submitting an issue of fact to a jury is a matter of "substantive law" or of "procedure", and (*b*) if the latter, whether it is controlled by the "local" law or by the "federal" law, is, so far as this case is concerned, entirely academic, irrelevant, and not necessary for its decision or to be considered.

It cannot make any difference in this case whether the sufficiency of the evidence, to require a submission to the jury of the question of Mr. Trivette's intentional suicide, is regarded as a matter of "substantive" law and controlled by the "local" law, or is regarded as a matter of "procedure" to be controlled by the "federal" law.

That is because in this case the evidence did not raise any disputed issue of fact (see, pp. 3-10, *supra*). regardless of whether it is measured by the "local" law or by the "federal" law.

The only case which Mrs. Trivette cites (Petition, p. 13) which merits any notice[5] is *Dick* v. *N. Y. Life*

[5]Mrs. Trivette's citation of *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U. S. 525 (Petition, p. 14) is irrelevant to this case. It involved simply a "*disputed* fact question" whether the defendant was a "statutory employer" under the local Workmen's Compensation Act, which the local South Carolina courts had "become accustomed to deciding" without the aid of juries merely as "a form and mode" of enforcing the Act's immunity and as a mode *not* "bound up with rights and obligations" created by the state.

Likewise her citation of *Magenau* v. *Aetna Freight Lines*, 360 U. S. 273, is irrelevant for the same reason, as it simply applied the *Byrd* case to a similar question involving Pennsylvania's Workmen's Compensation Act where the local rule, the Court said, was *not* an "integral part of the special relationship created by the statute".

Ins. Co., 359 U. S. 437; but that case is clearly distinguishable both as to the *facts* which it involved and as to the *law* [North Dakota] which it applied, as follows:

(1)The *facts* in the *Dick* case were entirely different from those in this case.

In the case of Mr. Trivette's death, there was not anything vague or mysterious about his firing the pistol. He was given to tantrums and "ugly", "dark" and "sullen" moods. Mrs. Trivette was an eye-witness —actually saw him "all in *one* motion" (Petition, p. 31a), "in *one* quick motion" (p. 35a), "in a flash, in *one* movement" (A. 64a)—without halt or interruption—"jerk the gun up" (A. 95a) and fire it into his head before she could "get over there" to "knock the gun away"—

"I couldn't save him" (A. 96a).

On the other hand, the facts about Dick's death were vague, mysterious and unexplained. He was "emotionally stable"—not given to the ugly or dark or sullen moods which characterized Mr. Trivette. There was no eye-witness. His shooting occurred apparently while he was alone on his farm. He was shot in *zero* weather in a silage shed on the floor of which there was "a sprinkle of frozen silage" (*icy and slippery*), with a 26-year-old shotgun which he usually kept in the shed and which "he didn't trust" when he went hunting because "once in a while" it had "fired accidentally".

Mrs. Trivette's counsel "conceded" in his argument in the Court of Appeals that Mr. Trivette shot

himself (Petition, p. 15a)—intentionally pulled the trigger with his own finger. Not so in the case of Dick, who was alone, and may have slipped on the frozen silage so as to throw or drop the gun, or actually may have been killed by another—and there was not any blood on his "bulky gloves" which he still wore and which (this Court pointed out) would have "made it difficult to turn the gun on himself".

(2) The *law* [North Dakota] which this Court applied in the *Dick* case is the exact *opposite* of the Kentucky law.

This Court made it clear that the impropriety of the directed verdict in the *Dick* case was because of the North Dakota law that the presumption of accident which that law raised "has the weight of *affirmative* evidence, and that

> "Under North Dakota law, this presumption [of accident] does *not* disappear once the insurer presents any evidence of suicide" (p. 443).

This Court recognized that "under the *Erie* rule" [304 U. S. 64], "presumptions (and their effects)" are "substantive" (p. 446) and that the North Dakota law's "presumed fact" of accident

> "*continues* and the plaintiff is entitled to affirmative *instructions to the jury* concerning its existence and weight" (p. 443).[6]

[6]That North Dakota rule apparently arises from that state's statute [ND Rev. Code, 1943, § 31-1101] to which this Court referred, which requires that, unless a "presumption" is actually "controverted" by "other direct or indirect evidence" "the jurors are *bound* to find according to the *presumption*" (p. 443).

The Kentucky law is the diametrically opposite of *every* one of those features of the North Dakota law—despite Mrs. Trivette's statement that the law of the two states "is substantially identical" (p. 21)—as next shown, viz.:

In a suit to recover "double indemnity", where death occurred through violence,

(*a*) Whereas, the North Dakota statute [ND Rev. Code, 1943, § 31-1101] requires that unless the "presumption" of accident which that state's law raises actually is controverted "the jurors are *bound* to find according to the presumption", there is *no* such Kentucky statute;

(*b*) Whereas, the North Dakota law *does* raise a presumption of *accident* where a gun-shot wound death is shown, the Kentucky law is that "There was *no* presumption that he shot himself accidentally" (*Mass. Mut. Life Ins. Co.* v. *Bush*, 236 Ky. 400, 404—not cited in Mrs. Trivette's Petition);

(*c*) Whereas, on account of that presumption, the North Dakota law "places on the insur*er* the burden of proving that death resulted from suicide" (*Dick* case, 359 U. S. at 446), the Kentucky law is that nevertheless "The burden was upon the *plaintiff* to make out her case" by proving an *accident*—and no such burden is placed upon the company(Id.);

(*d*) Whereas, on account of that presumption, the North Dakota law is that "a plaintiff is entitled to *affirmative instructions* to the jury con-

cerning" the presumption of accident, the Kentucky law is that it is an *error* "prejudicial to the substantial rights of the defense" for the court to instruct the jury that it is "presumed that he did not intentionally kill himself" or "did not die by his own hands" (*Mutual Benefit Life Ins. Co.* v. *Daviess' Ex'r,* 87 Ky. 541, 553-554); and

(*e*) Whereas, the North Dakota law's "presumed fact of accidental death", as this Court pointed out, "does *not* disappear once the insurer presents any evidence of suicide", but "*continues* throughout the trial and has the weight of affirmative evidence" (359 U. S. at 443-444), the Kentucky law is that where the evidence leaves no room for reasonable conclusion but that suicide occurred,

> "not only does the presumption *disappear entirely,* but it is the duty of the court to determine that death was caused by *suicide* and instruct the jury accordingly" (*Ky. Home Mut. Life Ins. Co.* v. *Watts,* 298 Ky. 471, 475).

Indeed, in *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161—which applied what this Court described in the *Dick* case at the "modern" rule [359 U. S. at 444]—this Court held that the presumption of accidental death "is *not* evidence and may *not* be given weight as evidence" whenever the *facts* in evidence are sufficient "to sustain a finding that the death was *not* due to accident" (p. 171).

Therefore, the *Dick* case does not have any bearing upon this case. It involved *facts* which were decisively different. It applied "substantive" *North Dakota* law which is diametrically opposite the Kentucky substantive law.

III. This case does not involve any question of "trial by jury" under the Seventh Amendment to the Constitution.

The District Court directed the verdict against Mrs. Trivette because she had failed to introduce any substantial evidence from which reasonable men might find in her favor the material issue, which was accident or suicide.

If it is Mrs. Trivette's argument that the Seventh Amendment deprives federal courts of power to direct a verdict for insufficiency of evidence, then the answer is given in *Galloway* v. *United States*, 319 U. S. 372, in this Court's extensive disquisition regarding the scope and meaning of the Seventh Amendment in its relation to jury trials, that—

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for *nearly a century*" (p. 389).

In that *Galloway* case this Court, in referring to insufficiency of evidence in respect of the jury trial required by the Seventh Amendment, pointed out that as far back as 1779[7] "inferences" which a jury is per-

[7]See, *Cockscdge* v. *Fanshaw*, 1 Doug. 118; *Patrick* v. *Hallett*, 1 Johns. (N. Y.) 241.

mitted to draw must not be "forced and violent inferences" and that "the essential requirement is that mere speculation be *not* allowed to do duty for probative facts" (p. 395), and nothing in the Seventh Amendment allows it "to join forces with the jury system" to supply essential proof (p. 396).

That construction of the Seventh Amendment has been carried into Rule 56 of the Federal Rules of Civil Procedure, in respect of summary judgments where the standard is that "there is no *genuine* issue as to any material fact".

There was no genuine issue raised by the evidence in this case concerning Mr. Trivette's intentional suicide. Mrs. Trivette herself foreclosed the matter with her testimony, out of her own eye-witness knowledge, that she tried to "get over there" to him to "knock the gun away", and her pitiful cry of her conviction that

"I couldn't save him" (A. 96a).

THIRD POINT.

Neither the coroner's jury verdict nor Mr. Trivette's death certificate was admissible in evidence for any purpose; and the District Court correctly excluded them.

Mrs. Trivette's Petition mentions that the District Court would not permit her to introduce in evidence the coroner's jury verdict or Mr. Trivette's death certificate (p. 7, 33a)—although she does not now claim that either was admissible. Indeed, both were properly excluded.

(1) As to the coroner's jury verdict, for more than fifty years the settled Kentucky law has been that a coroner's jury verdict is *not* admissible in evidence in an insurance case involving the question of the insured's suicide. See, *Aetna Life Ins. Co.* v. *Milward*, 118 Ky. 716, 725-727; *Aetna Life Ins. Co.* v. *Kaiser*, 115 Ky. 539, 546; *Pacific Mutual Life Ins. Co.* v. *McCabe*, 157 Ky. 270, 274.

(2) As to the death certificate, it is the settled Kentucky law that in a "double indemnity" suit, where the issue is accident or suicide, the statutory death certificate "is *not* admissible as evidence in respect to the issue of accidental death or suicide" (See *Ky. Home Mutual Life Ins. Co.* v. *Watts*, 298 Ky. 471, 498).[8]

The District Court correctly excluded both the coroner's jury verdict and the death certificate.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

R. Lee Blackwell,
Thomas W. Bullitt,
1700 Ky. Home Life Building,
Louisville, Ky.,
Counsel for Respondent.

7 June 1961

[8]As pointed out in that *Watts* case, a statutory death certificate may be admissible for the purpose of establishing the "identity of the deceased" and the "*cause*" of his death, such as whether it resulted from drowning, electrocution, gunshot wound, etc.; but it is *not* admissible as to the "*manner*" in which death occurred, such as whether it was accidental or self-inflicted or by suicide. In this case, it was Stipulated that the *cause* of Mr. Trivette's death was by "a gunshot or pistol wound" (A. 40a). Therefore there was not any issue as to cause, but only as to *manner*.

Certificate of Service.

I, R. Lee Blackwell, counsel for the New York Life Insurance Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 15, 1961, I served the foregoing Brief on the Petitioner, Mildred C. Trivette, by that day depositing a copy thereof in a United States mail box, in a duly addressed envelope, with First Class postage thereon prepaid, addressed to her counsel of record: O. T. Hinton, P.O. Box 641, Pikeville, Ky.; Herman G. Dotson, P.O. Box 274, Pikeville, Ky., and L. D. May, P.O. Box 655, Pikeville, Ky.

R. Lee Blackwell,
Counsel for New York Life Insurance Comany.